Appraisal of Indian Reserve Lands

by Fred Singleton

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Fred Singleton is the Director of Lands in the Department of Indian and Northern Affairs for the Canadian government. His duties include the overall direction and supervision of a wide range of activities relating to the administration and management of some 578 Indian Reserves and other lands surrendered by Indian Bands (Tribes) for sale, lease or other disposition.

At present, the total area of land falling within the scope of my responsibilities is 12,000,000 acres. I suspect this acreage will increase substantially in the foreseeable future as numerous native land claims are successfully negotiated and new reserves are created. The major increases, however, will be in the more remote and unsettled areas of Canada, particularly the Northwest Territories and the Yukon. In the more settled areas of the country, reserve lands are unlikely to be increased significantly and that is precisely why these reserve lands are so vital to the economic well-being of the Indian communities. Unfortunately, many Indian Bands in settled areas have an insufficient land base to meet present needs.

Under the Canadian Constitution, legislative jurisdiction for Indians and Lands reserved for Indians rests with the Federal Government. The basic federal legislation dealing with Indian reserves is the Indian Act and a number of regulations issued under authority of this statute. In addition to the Indian Act, special acts dealing with particular reserves or portions thereof have been enacted over the years. However, these acts are restrictive in their application and were designed to deal with special situations for which the Indian Act provisions were inadequate or inappropriate. For the purpose of this paper, the focus will be on the Indian Act and its implications.

It may be of interest to you that the Constitution of Canada passed by Parliament in 1982 states that the existing aboriginal and treaty rights of the aboriginal peoples of Canada, ie., Indian, Metis and Inuit, are recognized and affirmed. In addition, Section 25 of The Charter of Rights and Freedoms incorporated in our new Constitution makes it clear that no other provision can be used in a way that will interfere with any special rights that native people have now or may acquire in the future.

The general policy relating to Indian lands had its genesis in The Royal Proclamation of 1763, which has the force and effect of a statute, having never been repealed. In fact, native people consider this to be their "Charter of Indian Rights", recognizing, as it does, the pre-

existing land rights of native inhabitants of the country. In addition to recognizing land rights of native people living under the sovereignty and protection of The British Crown, The Royal Proclamation established the process by which native land rights were to be extinguished by surrender to the Crown.

When Canada became a nation in 1867, it acquired legislative jurisdiction over "Indian and lands reserved for Indians". However, the Federal Government did not obtain ownership of Indian lands, but rather exclusive authority to enact legislation respecting such lands. Ownership, for the most part, is vested in the Provinces which entered Confederation at that time. By taking a surrender of the Indian title, ownership reverted to the Province within which the lands were located. This tended to frustrate the Federal Indian land policy and necessitated the negotiation of remedial agreements with Provincial Governments. Agreements have been concluded with all Provinces except Quebec and Prince Edward Island. There are no Indian reserves in Newfoundland but, there may well be in future as a result of settlement of claims by native people of that Province.

The major provision of these agreements enables the Federal Government to take surrenders and manage the lands in accordance with the expressed wishes of the bands concerned. The surrender process is explained later in this paper.

The Indian Act defines a reserve as land set apart for the use and benefit of a band. The legal title to a reserve vests in the Crown, however, not the band. The band interest, often has been described as a "usufruct" the right to use and benefit of the lands thus set apart. There are varying views as to the nature of the band rights in a reserve. It is sufficient for our purposes to deal with these rights in accordance with the Indian Act. At the present time, this Act applies only to Indians registered in accordance with its provisions, and not to Metis or Inuit people.

While the reserve is set apart for the use and benefit of a band, individual band members can acquire property rights which can be leased under certain conditions and passed by devise to another band member.

The Indian Act stipulates that reserve lands are not subject to "charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian". In addition, reserve lands cannot be taxed by Federal, Provincial or Municipal Governments, although non-Indian interests in such lands may be subject to taxes. Indian Band Governments, however, may obtain authority to raise moneys by taxing interests in reserve lands and licensing businesses, callings, trade and occupations.

The special exemptions from seizures are important factors in determining the value of Indian lands and certainly represent a departure from the guidelines relating to appraisal of private lands.

From the foregoing, it will be seen that the system of Indian land tenure is unique as well as complicated. The Crown owns the land - the Indians enjoy its beneficial use. Indian lands cannot be sold, leased or otherwise alienated without the consent of the majority of band members - the process which we call a surrender. In rare cases, expropriation of reserve lands can take place but band consent is obtained except where the national interest is the overriding consideration. The Indian "usufruct" is a personal right and one which cannot be transferred except with Crown consent. It is for these reasons that the Crown, which holds the title, must be a party to all transactions affecting Indian lands.

Because reserve lands in settled areas of Canada are a limited band resource, the Department rarely accepts surrenders for sale, preferring to lease the lands for the benefit of the band. In some cases, such as the need to acquire reserve lands for public purposes, outright sale is necessary but it is the practice of the Department to obtain alternative lands and thus avoid adversely affecting the band's economic well-being.

In a number of Provinces, reserve lands are located in strategically important areas. In Vancouver for example, there are several bands which have the only land available to the municipality for expansion, development, road access, etc. As urban centres continue to expand, this will become an increasingly complex problem. I should point out

Compensation Announced

Yukon Indians will receive $183 million (1982 dollars) from the federal government over the next 20 years as partial compensation for surrendering aboriginal rights to parts of the 536 130 km^2 (207,080 sq. mi.) that comprise the Yukon Territory. The proposed cash settlement, announced December 17, 1982, by the Hon. John Munro, Minister of Indian Affairs and Northern Development, is another step towards an agreement-in-principle on the Council for Yukon Indians' (CYI) comprehensive land claim which has been under negotiation since 1973. The CYI represents approximately 5,500 Yukon Indians.

Of the $183 million figure, $130 million are in exchange for aboriginal rights to land and an additional $53 million are earmarked to enable Indians to take over native federal programs such as schools and social services.

The final agreement-in-principle on the Yukon Indians' claim will designate lands on a community-by-community basis. Selection of these lands is still under way. Certain lands will involve full native ownership, while larger portions will be set aside for traditional pursuits such as hunting, fishing and trapping. Negotiations continue between the Yukon Indians and the federal government on the question of subsurface mineral rights.

that while this situation may limit municipal or corporate expansion, it also severely restricts the ability of Indian bands to acquire additional land resources in the vicinity of the reserve.

The policy of the Canadian Government is to delegate its management and decision making powers to the band or band council, to the extent that such delegation is permissible under existing legislation. Unfortunately, the Indian Act provisions are inadequate for this purpose and the Department continues to be involved in decisions affecting reserve lands. It is anticipated that new legislation will be enacted in the near future which will enable bands to assume full responsibility for their lands.

In the meantime, the Department takes a flexible approach to administration and management of reserves and surrendered lands. Bands are involved in the decision-making process. In fact, the Department rarely, if ever, acts unilaterally in any land transaction. The final decision as to valuation of land for purposes of sale, lease or other disposition rests with either the band or band council, as the situation warrants. A band council resolution is needed before action regarding the land will be taken.

Today, many Indian Bands are forming legal corporations. The corporations surrender the land to the Crown, then in turn the Crown leases the land back to the Band corporation. In this way, the Indian Act can be circumvented, for it does not allow Indians to have legal right of ownership. As a corporate entity, Indians are now able to enter into contracts, something that was not allowed before.

Currently the Minister of Indian Affairs is the trustee of the lands. The Minister can disallow the sale of any lands by Indians to other interests. A new Indian Act, being developed by the Indians themselves, would allow Indians to manage and sell lands as they see fit.

Before proceeding with any sale, lease or other disposition of land, it is customary to obtain the advice of a qualified appraiser as to the value of the lands involved. Too often, appraisers have little or no experience in valuing reserve lands and tend to apply the principles governing private lands. Failure to recognize that the unique character of the Indian land tenure system and the cultural dimension factor significantly affects the value of reserve lands could invalidate the appraisal. Value of land to the Indian, therefore, has a totally different meaning than value to the non-Indian.

An excellent article, appearing in the August 1981 issue of Appraisal Institute Magazine (AIM), written by W. V. Lowry, AACI, and senior member of the Department of Indian and Northern Affairs details the major constraints and cultural differences that must be recognized when making an appraisal of Indian lands. The rest of this paper is almost entirely excerpts from Lowry's article and are reprinted with permission from AIM.

To most Indian cultures, land is a gift and should be treated as such. Respect for oneness with the world and judicious use were the norms in relation to land and the value was not based on income or sale price. Even the urban sophisticate whose reserve is in the city and who deals on an equal basis with the business world has a unique attitude toward the reserve. The measures of value are not the same as are found in the normal business environment, nor should the appraiser expect the bands or their councils to conform to theories based on the marketplace.

An authority on Indian lands in Alberta who has had wide experience dealing with bands varying in economic status from poverty to wealth stated it well: "In our culture, land is simply a commodity. This is borne out by the fact that we can appraise land purely on its revenue bearing capacity and can judge the value of land in use against the same value in dollars invested.... The Indian cannot look at his land with the same view. Land, to the Indian, is a gift from the Great Spirit not to be reckoned with a

dollar value but to be valued in the same manner in which we value 'life.' This factor places a value on the use of reserve lands that is virtually beyond our white man's capacity to comprehend."

Lowry also writes that the appraiser of reserve lands must start with Indian Act, for it creates a way of making land transactions that are unique. The process of surrender is slow and procedures must be "meticulously" observed, or an appraisal will become invalid.

Although rare, the sale of Indian land is possible. But, unlike other property owners, once the tribe sells its land, it can not replace that land with another parcel. An appraiser needs to examine relative costs towards exchange of land, rather than "market value" comparisons.

Directly related to the sanctity of reserve land is a major difficulty faced by utility companies in their negotiations for rights-of-way. Nothing tests the quality of a negotiator more than the assignment of obtaining a right-of-way from a band, while an appraiser may find the value of compensation rather easily. Reserve land cannot be expropriated, except pursuant to such drastic measures as the "War Measures Act."

Section 35 of the Indian Act provides that the Governor-in-Council may allow a body with expropriating authority to implement that authority or may grant the same rights to the body. However, the significant word is "may" and present policy quite clearly provides that no submission requesting exercise of this provision will be forwarded without concurrence of the band. Needless to say, this places the band in a negotiating posture that invites strong language and maledictions from the other side. The appraiser can soon complete his assignment by asking the company the cost of avoiding the reserve, but the negotiator is faced with a situation wherein the comfort of expropriation authority is missing. One frequently hears unfavourable comments on the reaction of a band in such a position, but it would seem reasonable to suppose that were the rules reversed, the attitude would be the same as the band, i.e. it's just good business.

Canadian Indian Band Court Decision

The Supreme Court of Canada ruled that the ownership of land surrendered by Indians reverts to the Provinces and not to the Federal Government. The Court brought down its decision which was in relation to a dispute between a Micmac band in New Brunswick and an individual, Gilbert Smith who had purchased part of a former Red Bank Reserve land in the 1950's. The Micmacs were pressing for the return of the land which had been occupied by non-Indians since 1838. The decision, in favor of Smith, ruled that he is entitled to a declaration for possession of said land.

Another common assignment of appraisers is the valuation of lands held by a band member, perhaps in relation to a sale to another band member or perhaps for estate purposes. The Indian Act provides for individual "ownership" of part of the reserve. The Band Council as previously mentioned, may allot a parcel of land to a band member and once the Minister has approved the allotment by a "Certificate of Possession," the band member has exclusive use and possession. He cannot transfer it to anyone who is not a member of the band.

Frequently the evaluation of such a parcel is needed to clear an estate and it is incumbent on the appraiser to recognize that while market comparison is the logical approach, the market is limited to band members or the band. There have been appraisals of such locatee land on the basis of market value of land outside the reserve that indicate values ten to twenty times the actual sale price of the parcel. Currently, the principle of Certificate of Possession is being contested in court. The Indian's right to transfer land to his/her children is being challenged. The court is being asked to limit an individual Indian's right to "own" and occupy land only for the duration of his/her life.

The appraisal of locatee lands arising from the possibility of leasehold income is a different problem. The Act provides that the locatee can request the Minister to issue a lease for his benefit to a non-Indian. The usual assignment for the appraiser is the same as most leasehold problems on reserves, which is the determination of a fair annual rent. The appraiser must be cautious in recognizing the difference in market between the sale of locatee rights to another band member, and the leasing of these rights to an outsider. The basic rule of market approach must be recognized, that apples cannot be compared to oranges.

Perhaps in conclusion, the appraiser should keep in mind A. H. Maslow's theory of the hierarchy of needs. Maslow postulated that man must satisfy needs in seven ascending orders of priority from basic physiological needs such as food to highly mental needs such as satisfaction of ego and aesthetics. The lower must be satisfied before the next higher motivates his activity. Most people in the business world are dealing in land at the upper levels, but the Indian relates to land at about the second level—that is, at the need for security. Think carefully on this difference, and in appraisal assignments please recognize the vast gap between the need for safety or security and the need for ego gratification.